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In The
Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD SCHOONOVER

Petitioner,

vs

WILD INJUN PRODUCTS
HAROLD W. FINNEY, JR.,
AND JOHN D. FORTNEY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Federal Circuit's continued improper use of Federal Circuit Rule 36 is contrary to appropriate appellate judicial procedure to warrant invocation of this Court's supervisory power.

II. Whether by disregarding extrinsic evidence where the specification does not define a claim term the Federal Circuit creates an inherent conflict with its own precedent which this Court must resolve.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court of Appeals for the Federal Circuit were petitioner Richard Schoonover, plaintiff-appellant below, and Wild Injun Products, Harold W. Finney, Jr., and John D. Fortney, defendants-appellees below and respondents to this petition.

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No.

In The
SUPREME COURT OF THE UNITED STATES

Richard L. Schoonover

Petitioner,

vs.

Wild Injun Products,
Harold W. Finney, Jr and John D. Fortney

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard L. Schoonover requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this action on May 4, 1995, which affirmed without opinion a final judgment of the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The order denying petitioner Schoonover's Petition for Rehearing is also included in Appendix A. The judgments of the Court of Appeals for the Federal Circuit and the trial court were not reported, but are included in the Appendix B and C respectively.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 4, 1995. A timely Petition for Rehearing was filed, but denied by the Federal Circuit on June 1, 1995. The jurisdiction of this Court is founded upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

This case involves the appellate jurisdiction of the Court of Appeals for the Federal Circuit under Sections 2071 and 2111, Title 28, United States Code as well as Federal Circuit local Rule of Practice

36.

28 U.S.C. § 2071(a):

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

28 U.S.C. § 2111:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Circuit Rule 36:

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following circumstances exist:
(a) the judgment, decision or order of the trial court appealed from is based on findings that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(d) the decision of an administrative agency warrants affirmance under the standard of

review in the statute authorizing the petition for review; or
(e) a judgment or decision has been entered without an error of law; and an opinion would have no precedential value. Fed. Cir. R. 36.

STATEMENT OF THE CASE

At the close of petitioner Schoonover's case alleging infringement of his U.S. Patent No. 5,012,531, entitled "Form Retaining Holder for a Visored Cap", the trial court granted respondents judgment on partial findings pursuant to Rule 52(c) of the Federal Rules of Civil Procedure. The trial court's decision is set forth in the Memorandum Opinion Including Findings of Fact And Conclusion Of Law(App. C).

The Memorandum Opinion states the trial court, "as a matter of law, interprets the term 'shell member' in view of the language of the claims, the drawings and the specification of the '531 patent, as meaning "a substantially continuous rigid surface." (App. 10a) Acting as the fact finder in the

bench trial, the trial court also addressed the second factual infringement prong in stating: "The Court, as finder of fact, finds that the defendant's product contains no 'shell member,' or its equivalent, as that term is used in the '531 Patent." Id.

After extensive briefing and oral argument, the Federal Circuit affirmed without opinion citing its local Fed. Cir. R. 36 several days after oral argument. The Federal Circuit denied without comment a timely Petition for Rehearing, which was based in part upon the intervening *Markman v. Westview Instr. Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

REASONS FOR GRANTING THE PETITION

The Schoonover case presents important issues regarding the Federal Circuit's ever-increasing use of Fed. Cir. R. 36 summary affirmances without opinion in the area of claim interpretation and the Federal

Circuit's total disregard for extrinsic evidence in claim interpretation where the specification does not define a contested claim term.

First, may the Federal Circuit through Fed. Cir. R. 36 continue to summarily affirm trial court decisions without addressing the dispositive issues of an appeal when any one of the five criteria of Fed. Cir. R. 36 is met.

Second, may the Federal Circuit call for a rule excluding extrinsic evidence in claim interpretation in lieu of the patent specification where the specification and file history provide no definition for a disputed claim term and prior conflicting Federal Circuit precedent explicitly limits the weight given to the specification in claim interpretation.

The Federal Circuit panel below has presumably decided each of these important questions in the affirmative without comment

or analysis. In so doing, the Federal Circuit has placed itself directly at odds with several regional Circuits which require an examination of dispositive issues before summary affirmance, appropriate appellate procedure which requires a contrary result, and the Federal Circuit's own conflicting precedent.

ARGUMENT

I. The Federal Circuit's Continued Improper Use of Federal Circuit Rule 36 Is Contrary to Appropriate Appellate Judicial Procedure So That Exercise Of This Court's Supervisory Power is Required.

Like other courts established by an Act of Congress, the Federal Circuit may establish rules for the oversight of its docket.

28 U.S.C. § 2071(a) states:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice

> and procedure prescribed under section 2072 of this title.

However, these rules must always comport with appropriate appellate procedure to address those dispositive issues which involve "the substantial rights of the parties." See 28 U.S.C. §2111

The Federal Circuit is a court of exclusive jurisdiction charged with reviewing trial court decisions including those arising under 28 U.S.C. § 1338 pursuant to its enabling act, the Federal Courts Improvement Act of 1982. S. Rep. 97-275, 97th Cong., 1st Sess. 5. By establishing the Federal Circuit, Congress hoped to create uniformity in substantive patent law by resolving existing and eliminating future conflicts between the regional Circuits. *Panduit Corp. v. All States Plastic Manufacturing Co., Inc.*, 744 F.2d 1564, 1574 (Fed. Cir. 1984).

Pursuant to this mandate, the Federal

Circuit is to preside over appeals from the trial courts regarding substantive patent law, including claim interpretation, pursuant to 28 U.S.C. § 2111.

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. 28 U.S.C. § 2111.

The mechanism for the Federal Circuit's establishment of uniformity in substantive patent law initially was the written opinion. As the Federal Circuit emphasized in adopting Fed. Cir. R. 18 in 1982:

> Disposition of appeals shall be with a published opinion or an unpublished opinions. Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published in commercial reports of decisions. Id.

Former Chief Judge Markey articulated the following rationale for Fed. Cir. R. 18:

> [T]he Court agreed at the outset to issue an opinion in every

> single case decided on the merits. Some would be published, and some would not be, but every case would get an opinion and every opinion would tell the loser why he lost.
>
> * * *
>
> It is tradition. It is a requirement of the courts of this land, thank God. We do not issue fiats. We do not just render a one-worded decision and go away. We explain our decisions. It is one of the great keys of the American judicial system. It is unfortunate that there are today so many cases that each cannot be explained in detail. In our Court there will be an opinion explaining enough to tell you what the law is in every case. And that is the main thing. That is the reason for explaining decisions. You would never know what the law is otherwise. 100 F.R.D. 499, 509 (1983).

The original Federal Circuit practice of providing written opinions, whether precedential or non-precedential, was also consistent with the findings and recommendations of numerous commissions and advisory conferences. Commission on Revision of the Federal Appellate System, 67 F.R.D. 195 (June 1975 Commission Report); "The Non-

Precedent - Limited Publication and No-Citation Rules in the United States Court of Appeals," 78 Columbia L. Rev. 1167 (1978). Each conference emphasized the public's need for a written opinion whether precedential or non-precedential.

The Federal Circuit subsequently implemented Fed. Cir. R. 36 in 1989 permitting for the first time summary affirmance without opinion. As evident from review of Fed. Cir. R. 36, summary affirmance without opinion is permissible when one of the following criteria are met:

> (a) the judgment, decision or order of the trial court appealed from is based on findings that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing

the petition for review; or

(e) a judgment or decision has been entered without an error of law; and an opinion would have no precedential value. Fed. Cir. R. 36.

The summary affirmance under Fed. Cir. R. 36 logistically is simply signed by the Federal Circuit Clerk without any indication which of the above-listed criteria were relied upon by the Federal Circuit in issuing the order. See Jennifer A. Tegfeldt, "A Few Practical Considerations In Appeals Before The Federal Circuit", 3 Fed. Circuit B. J. 237 (1993).

Unlike the summary affirmance rules of several regional Circuits, Fed. Cir. Rule 36 also has the additional flaw of permitting summary affirmance when any of the five circumstances exist and the panel believes an opinion would not have precedential value. Pursuant to the language of the Fed. Cir. R. 36 itself, summary affirmance may be granted in impermissible instances. For

example, where an appeal addresses the sufficiency of evidence and a legal error, Fed. Cir. R. 36 permits summary affirmance if the evidence is sufficient or if there is no legal error, even where neither inquiry is dispositive of all issues on appeal. In so doing, dispositive legal errors are not reviewed or addressed.

The five alternative "criteria" of Fed. Cir. R. 36 also significantly do not include an analysis of "dispositive issues" prior to summary affirmance. Although it is almost a verbatim version of 11th Cir. R. 36-1, Fed. Cir. R. 36 does not include the Eleventh Circuit's limitation that circumstances justifying no opinion must be "dispositive". 11th Cir. R. 36-1. Similarly, the Fifth Circuit also requires an independent analysis to determine "that no error of law appears...." prior to issuance of a summary affirmance. 5th Cir. R. 47.6. Absent such a requirement, Federal

Circuit Rule 36 does not comport with the requirements of 28 U.S.C. §§ 2072 and 2111 and inappropriately abridges the "substantial rights of the parties."

In the instant matter, the Federal Circuit could have affirmed the trial court on any one of several grounds. In so doing, the Federal Circuit is affirming even though its analysis may not be dispositive of all issues. For example, the Federal Circuit may have concluded that: the "findings ...are not clearly erroneous", under subsection a; the "directed verdict ... [was] supported by the record", under subsection b; or "a judgment... has been entered without an error of law", under subsection e. See Fed. Cir. R. 36

Petitioner Schoonover challenges both the sufficiency of the record for supporting the factual finding of infringement as well as the legal sufficiency of the trial court's claim interpretation which excluded

any extrinsic evidence. However, the Federal Circuit provided no insight regarding its analysis or which of the five criteria of Fed. Cir. R. 36 it applied in affirming the trial court. This result does not comport with appropriate appellate procedures.

This result is directly contrary to 28 U.S.C. §§ 2071 and 2111. As stated above, Section 2071 permits the Federal Circuit to establish "rules for the conduct of their business" such as Fed. Cir. R. 36, but only so long as these rules are consistent with the Acts of Congress and Section 2072."

One such Congressional Act in conflict is 28 U.S.C. 2111, which requires "judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties" thereby inherently requiring examination of those issues which affect "the substantial rights of the parties."

The trial court opinion below also does

not address many of the issues before the Federal Circuit on appeal. For example, by failing to address the other claims as an interpretation tool, but incorporating the rigidity requirement found exclusively in Claim 8 into Claim 1, the trial court committed reversible error. Similarly, the trial court failed to permit extrinsic evidence to define the claim term "shell member" which was not defined in the specification. These errors of omission were not included in the trial court's analysis in the opinion below. The opinion below utterly fails to provide reasoning to support former Chief Judge Markey's suggestion that the losing party read "the affirmed decision below to find out why he lost on appeal." *Proceedings of Eighth Annual Jud. Conf. of the U.S. Ct. of App. for the Fed. Cir.*, 133 F.R.D. 345, (1990).

Proper judicial procedure requires that an appellate court articulate some reason

for its decision. In failing to provide any explanation for a summary affirmance under Fed. Cir. R. 36, the Federal Circuit unnecessarily increases the risk of appellate error. The writing of opinions, whether precedential or non-precedential, requires that the court succinctly and collectively discuss and ultimately decide all the issues before it via a written analysis. The use of summary affirmance necessarily curtails the matching of reasoning and analysis between the panel members that is the inherent result of the opinion writing process. In the wake of a summary affirmance, important and dispositive issues will not be addressed if for no other reason than one of the other four criteria are met.

The erroneous use of summary affirmance is further compounded by its effect upon the appellate process as a whole. Petitioner Schoonover, as the losing party before the

Federal Circuit, was unable to "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended" in filing its unsuccessful Petition for Rehearing under Fed. Cir. R. 40(a). Just as the trial court failed to sufficiently address the dispositive issues, the Federal Circuit also provided no analysis. The instant petition similarly suffers to some degree by the Federal Circuit's failure to include any reasoning below.

The failure to provide written analysis has left wide dissatisfaction in the patent bar in particular and the public in general. This widespread problem was repeatedly found in lawyers' statements reprinted in the "Almanac of the Federal Judiciary Vol., 2" (Aspen Law & Business 1995):

> Another problem that attorneys brought up repeatedly was the overuse of Rule 36....Nearly all lawyers interviewed believed the court was using it to duck

> important issues.
>
> * * *
>
> Rule 36 is being used too much. When Rule 36 was initiated it was used in 10 percent of the cases before the court. Now it is used in 40 percent of the cases. Id.

Recently, the Federal Circuit Subcommittee of the American Intellectual Property Law Association initiated a study regarding the Federal Circuit's ever-increasing use of Rule 36 in disposing of cases without opinion.

The apparent lack of review inherent in a summary affirmance does little to bolster confidence in the appellate process regarding patent matters. In an era when the Federal Circuit has increasingly called for claim interpretation as a question of law to be performed solely by the trial court (presumably so that the Federal Circuit may review said claim interpretation de novo), the ever-increasing use of Fed. Cir. R. 36 is quite inconsistent. *See Markman v. Westview Instruments Inc.*, 52

F.3d 967 (Fed. Cir. 1995).

II. BY EXCLUDING EXTRINSIC EVIDENCE IN FAVOR OF A SPECIFICATION WHICH DOES NOT DEFINE A CLAIM TERM, THE FEDERAL CIRCUIT CREATES AN INHERENT PRECEDENTIAL CONFLICT.

By excluding extrinsic evidence, even where the specification and file history provide no definition for a claim term, the Federal Circuit encourages arbitrary claim analysis. By conflicting with its own precedent in favor of arbitrary claim interpretation, the Federal Circuit by ignoring extrinsic evidence unwisely permits unwarranted judicial speculation.[1] Extrinsic evidence is more indicative of an appropriate interpretation of a claim term than a specification that fails to provide

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[1]Even a dictionary would have been preferable to the trial court's definition which limited "shell member" to an egg shell. For example, *Websters Dictionary* defines "shell" as a "hard outside covering; an outside crust; **framework**...."(emphasis added).

a definition for that term used in the claim.

Hornbook patent law teaches that the patentee, rather than the trial court, is entitled to be the lexographer. Only by permitting the patentee to utilize his own vocabulary can new inventive concepts sometimes be satisfactorily described. The inventor patentee should not be limited to a trial court's often laymen's definition of a patent term. Nevertheless, the exclusion of extrinsic evidence and expert opinion as to the knowledge of one skilled in the art creates this very undesirable situation.

The Federal Circuit has long held that the specification, including drawings, is not a limitation upon the claims.

> Specifications teach. Claims claim....That a specification describes only one embodiment does not require that each claim be limited to that one embodiment. . . . Claim interpretation must not make use of "best mode" terms inasmuch as the patentee need not guard

> against infringement by listing every possible infringing device in the specification. *SRI International v. Matsushita Elec. Corp.*, 775 F.2d 1107 (Fed. Cir. 1985)(in banc)

A patent claim is not limited to, and almost always is broader than, the particular embodiments disclosed in the patent specification. *Specialty Composites v. Cabot Corp.*, 845 F.2d 981 (Fed. Cir. 1988).

Where a specification only provides a best mode without a claim term definition, the Federal Circuit consistently directed trial courts to extrinsic evidence including the testimony of those skilled in the art.[2]

---

[2]*See Bausch & Lomb v. Barnes-Hind*, 796 F.2d 443 (Fed. Cir. 1986)(Disputed meaning of "smooth" with respect to soft contact lenses construed in accordance with extrinsic evidence as viewed by those skilled in the art.); *Rawplug Co., Inc. v. Illinois Tool Works, Inc.*, 11 F.3d 1036 (Fed. Cir. 1993)("Apart from the clear language of the patent claims, we also consider the prosecution history, the prior art, and any expert testimony on the meaning of the claims."); *Loctite v. Ultraseal*, 228 USPQ 90 (Fed. Cir.

However, these cases are directly in conflict with other Federal Circuit precedent which creates an exclusion for extrinsic evidence such as *Intellicall v. Phonometrics*, 21 USPQ2d 1383 (Fed. Cir. 1992), and *Markman v. Westview Instr. Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

Where the specification fails to define a claim term, the analysis must focus upon extrinsic evidence to determine how those skilled in the art define the claim term so long as there is no direct conflict with the specification. Herein, as the trial court recognized, the specification never defined the claim term "shell member". *(App. 7a)* Yet, the trial court in granting a directed verdict concluded that "shell member" consisted of a substantially continuous

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1985)(Words in a claim are to defined as one would who is skilled in the art or as the inventor has defined the terms); *McGill v. Zink*, 736 F.2d 666 (Fed. Cir. 1984)

rigid surface despite testimony from those skilled in the art that "shell member" included a framework (as in a building). The trial court's reliance upon the laymen's general definition of a shell (as in an egg shell) was wholly inappropriate engineering definition for the term "shell member". By ignoring the extrinsic evidence offered by the patentee via testimony and expert opinion, the trial court erred.

However, this error is the necessary result of the inherent conflict between those Federal Circuit cases excluding extrinsic evidence and cases properly identifying the limited teaching purpose of the specification identified above. Only through this Court's intervention will this inherent conflict in Federal Circuit precedent be resolved.

III. CONCLUSION

For the reasons set forth above, this Court should grant this petition for

certiorari on the Fed. Cir. R. 36 issue, and consolidate with other pending petitions seeking similar review which should also be granted. Alternatively, the Court should grant *certiorari* on the exclusionary rule for extrinsic evidence and consolidate this case with *Markman*, whose petition should also be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1489

RICHARD L. SCHOONOVER
Plaintiff-Appellant,

vs.

WILD INJUN PRODUCTS
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio

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DECIDED: June 1, 1995

Before RICH, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

A petition for rehearing having been filed by the APPELLANT, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on June 8, 1995.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-1489

RICHARD L. SCHOONOVER
Plaintiff-Appellant,

vs.

WILD INJUN PRODUCTS
Defendant-Appellee.

DECIDED: May 4, 1995

JUDGMENT

ON APPEAL from the U.S. District Ct. Northern District of Ohio in CASE NO(S). 5:93 CV 1085 This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam: (RICH, Circuit Judge, COWEN, Senior Circuit Judge, and MICHEL, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD L. SCHOONOVER,
Plaintiff-Appellant,

v.

WILD INJUN PRODUCTS,
Defendant-Appellee.

INTRODUCTION

The above-captioned matter came on for trial to the Court on July 18, 1994. On July 19, 1994, at the close of plaintiff's case on the issue of infringement, defendant moved for a directed verdict. Prior to trial, the parties submitted a joint stipulation of facts (Docket No.). For purposes of this Memorandum Opinion, this stipulation is adopted by the Court and incorporated herein by reference.

The Court herein issues its ruling on

defendant's oral motion, doing so on the authority of Rule 52(c) of the Federal Rules of Civil Procedure which provides:

> (c) **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by finding of fact and conclusions of law as required by subdivision (a) of this rule.

APPLICABLE LAW

In this case, plaintiff Richard L. Schoonover, holder of U.S. Patent No. 4,012,531, Form Retaining Holder for Visored Cap, (the '531 Patent"), alleges, inter alia, that the defendant's product know as a Ballcap Buddy infringes the '531 Patent. In order for the Court to find for the

plaintiff on the issue of infringement, at least one of the claims of the '531 Patent must read on the defendant's product.

Before determining whether the claims read on the product, the meaning of the terms in the claims must be interpreted. Claim interpretation is a question of law. Intellicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1387 (Fed. Cir. 1992). Determining whether the claims as interpreted read on the defendant's product is a question of fact. Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448 (Fed. Cir. 1985).

ANALYSIS

Plaintiff presented testimony, primarily from an expert witness, on the meaning of the terms of Claim 1 of the '531 Patent. In Claim 1, Schoonover claims:

> 1. A form retaining case for a cap, said cap having a crown portion with front and rear halves, and a visor portion affixed to the front half of said crown portion, said rear half of said crown portion being

inwardly foldable to be proximate to said front half thereby forming first and second surfaces in such folded position, said protective case comprising:

a first shell member having a visor portion and a crown portion and first and second surfaces, said first shell member having its second surface sized and adapted to be slightly larger than, and to closely accommodate, the first surface of said cap when the crown portion of said cap is in said folded position;

a second shell member having a visor portion and crown portion and first and second surfaces, said second shell member having its first surface sized and adapted to be slightly smaller than, and to closely accommodate, the second surface of said cap when the crown portion of said cap is in said folded position;

at least one means for engaging the visor portion of said first shell member with the visor portion of said second shell member while the visor portion of said cap is juxtaposed between said the visor portions of said first and second shell members; and

at least one means for fastening the crown portion of said first shell member to the crown portion of said second shell member when the crown portion of said cap is juxtaposed between the crown

portions of said first and second shell members.

The expert identified the first paragraph as the "preamble" of the claim and indicated that nothing in the preamble limits what is claimed by the inventor. For purposes of this memorandum, this view of the expert will be taken as true. The expert identified the four indented paragraphs as the four "elements" of the claim and stated that it is these elements which are looked for in the accused device.

The expert testified that elements one and two of the '531 Patent claims a "first shell member" and a "second shell member." The term "shell member" is not specifically defined anywhere in the patent. Therefore, the Court must interpret the meaning of that term. When construing claims, the specifications, the drawings, and the file wrapper are all useful tool. See, e.g., SRI International v. Matsushita Electric Corp.

of America, 775 F.2d 1107 (Fed. Cir. 1985).

The drawings of the '531 Patent all show a substantially continuous surface when indicating the "shell members." See, Plaintiff's Exhibit 1. At page 1 of the '531 Patent, the drawing shows No. 40A and NO. 52A, which plaintiff's expert testified appeared to represent the two "shell members" of Claim 1. These same elements are shown in Fig. -6A of the '531 Patent.

Within the specification of the '531 Patent, the inventor states, contrasting his invention with another invention, that his invention provides "protection of the cap from accidental spills, dirt, etc." Col. 2, Lines 42-43. The specification also indicates that one object of the invention is "to provide a form retaining support for maintaining the shape of a visored cap . . . ." Col. 2, Lines 47-49. It further provides that another object is "to provide a means for encasing a baseball cap . . . ."

Col. 2, Lines 57-58. The specification also notes, again comparing this invention to a piece of prior art, that a certain "rigidity' is "required." Thus, the specification suggests that "shell member" is to be interpreted as a continuous, that is, unbroken, rigid surface designed to both hold the shape of the cap and to protect it from dirt and spills.

The fact that Fig. -7A and Fig. -7B show ventilation holes, designed to permit drying of dampness from perspiration and precipitation, does not affect a finding that the "shell members" are substantially continuous rigid surfaces.

This interpretation of "shell member" is consistent with the stated object of the patent, that is, to protect a ballcap from dirt and spills and to help to retain its shape while drying after a ballgame and when stored for whatever reason.

Accordingly, the Court, as a matter of

law, interprets the term "shell member," in view of the language of the claims, the drawings and the specification of the '531 Patent, as meaning "a substantially continuous rigid surface."

In order for the defendant's product to infringe Claim 1 of the '531 Patent, it must contain a shell member, that is, a substantially continuous rigid surface. This is a question of fact.

The Court, as finder of fact, finds that the defendant's product contains no "shell member," or its equivalent, as that term is used in the '531 Patent. Rather, the defendant's product consists of a frame-like structure formed by ribs or spines spaced in such a way as to form large open spaces between the ribs or spines. This structure is consistent with the purpose of the defendant's product, that is, to help a ballcap retain its shape while during cleaning while at the same time providing

plenty of open spaces for the water and cleansing agents to reach the cap placed in the structure.

Having found that defendant's product does not contain the element of a "shell member" or its equivalent, the Court need make no further findings. The absence of that element means that defendant's product does not infringe the '531 Patent.

CONCLUSION

Accordingly, defendant's oral motion for a directed verdict on the issue of infringement is granted. The Court hereby declares that the defendant's Ballcap Buddy product does not infringe the plaintiff's U.S. Patent No. 5,012,531.

IT IS SO ORDERED.

/s/David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD L. SCHOONOVER,
Plaintiff-Appellant,

v.

WILD INJUN PRODUCTS,
Defendant-Appellee.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion Including Findings of Fact and Conclusions of Law filed this date, IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of the defendants on plaintiff's claim of patent infringement. Defendants have voluntarily dismissed their counterclaims in open court. Each party to bear its own costs. Case closed.

/s/ David D. Dowd, Jr.
U.S. District, Judge